IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 734 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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HINDUSTAN APPAREL INDUSTRIES

Versus

FAIR DEAL CORPORATION

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Appearance:

MR SH SANJANWALA for Petitioner

MR AM Kapadia for MR SB VAKIL for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 27/07/2000

ORAL JUDGEMENT

This appeal is directed against the impugned judgment and decree dated 16.12.1978 passed by the learned Jt. Civil Judge (SD) Surat in Special Civil Suit No. 95/1976. The plaintiff having partly succeeded and partly failed has preferred this appeal in respect of the

disallowed claim.

The plaintiff sued to recover Rs. 61,886.16 plus Rs. 11,124/- by way of interest at the rate of 9% p.a. from 4/3/1974 from the defendant ( The parties are respectively the appellant and the respondent in the First Appeal proceedings). The trial court decreed the suit for Rs. 26,371-86 with running interest at the rate of 6% p.a. from the date of the suit till payment holding that remaining claim was barred by law of limitation.

When this appeal came up for final hearing it was contended in the appeal that the cheques Exhs. 117 and 119 dated 15.4.1974 and 27.3.1974 each for a sum of Rs. 5000/ issued in favour of the plaintiff on account of the dues amounted to acknowledgment of liability by the defendant in as much as the original transactions for purchase of goods of Rs. 98,428-50 ran between 7.1.1972 and 9.1.1973 and the issuance of the aforesaid cheques was quite before the expiry of period of limitation and by virtue of provisions of section 18 of the Limitation Act, 1963 ( for short 'the Act') fresh period of limitation should start from the date of issuance of the cheques. Reference was made on behalf of the plaintiff to the decisions in the case of Prafulla Chandra vs. Jatindra Nath reported in AIR 1938 Calcutta 538, Subramanyam Vs.Venktaratnam reported in AIR 1956 Andhra Pradesh 105 and Rajpatiprasad V/s. Kaushlya Kuer reported in AIR 1981 Patna 187. The Single Bench of this Court (Coram: KR VYAS,J.) referred to decision of the Patna High Court in Rajpatiprasad's case (supra) expressing the view that all the post dated cheques in satisfaction of dues would amount to acknowledgment of liability irrespective of the fact whether the cheques were subsequently dishonored. A reference has also been made to the decision of Andhra Pradesh High Court in Subraaamanyam's case (supra) which has held that a cheque is not only evidence of payment, but it ex-facie contains the recitals admitting the payment and would satisfy the requirements of section 20 of the Limitation Act (Previous). Thus, a cheque together with subsequent receipt of money by payee would amount to acknowledgment of payment within the meaning of proviso to the said section. The Ld. Single Judge observed that by issuing a cheque, a person is admitting debt owing by him to the person to whom he is making payment by cheque. The admission of debt has to be determined with reference to the point of time at which the purported admission was made, that is to say, when the cheque was issued. An

admission did not cease to be an admission merely because it is subsequently retracted. For any reason, if the cheque is not honored subsequently, it will not change the intention of the party of accepting the debt at the time of issuance of cheque. The Single Bench of this Court finally observed that justice and equity would demand such a construction of the provision contained in section 18 of the Act.

However, in view of the fact that there was a binding decision of Bombay High Court rendered during the period prior to reorganisation of States of Maharashtra and Gujarat, rendered in Chintaman Dhundiraj Vs. Sadguru Narayan Maharaj Datta Sansthan reported in AIR 1956 Bamboo 553, the Single Bench of this Court proposed reference to a larger bench.

The matter went before a Division Bench in the first place and bearing in mind the fact that the question required consideration at the hands of Full Bench in view of the fact that validity of Division Bench decision of Bamboo High Court in Chintaman's case (supra) was in essence involved, by order dated 6.12.1999 the Bench ( Coram: YB Bhatt & AK Trivedi, JJ ) directed the reference accordingly. Accordingly, the matter went before the Full Bench and the Full Bench by its decision dated 9.5.2000 held that the payment by cheque which is dishonored would amount to acknowledgment of debt and the liability and that would save period of limitation as envisaged by sec. 18 of the Limitation Act.The Full Bench having remanded the matter to the Single Bench, the appeal has been placed for final hearing. That is how, the same has come up for final hearing before this Court.

Mr AM Kapadia learned advocate appearing for Mr SB Vakil for the appellant ( Ori. plaintiff) and Mr RS Sanjanwala for the respondent addressed this Court. According to Mr. Kapadia, in view of the full bench decision as also in view of the referring judgment there is nothing further left out to be submitted by otherside. However, Mr.Sanjanwala learned advocate for the respondent-defendant submitted that in the first instance, there is no specific pleading with regard to saving of limitation by issuance of cheques even though they were dishonored and, therefore, in absence of specific pleadings, the plaintiff's suit should be held to be barred by law of limitation in so far as the disallowed claim is concerned. He then submitted that even if the cheques are treated as having been pleaded by way of acknowledgment as contemplated by sec. 18 of the

Limitation Act, such cheques would save limitation only with regard to the amount of the cheques. Both these submissions deserve to be rejected. As regards first submission, following observations in the referring judgment answer the contention of the defendant:

"Mr RS Sanjanwala learned advocate appearing for the respondent submitted that for claiming benefit under section 18 of the Limitation Act, the plaintiff is required to plead his case and also to prove the case by leading evidence. To substantiate his contention, he has placed reliance on the judgment of the Supreme Court in the case of Sant Lal vs. Kamla Prasad. AIR 1951 SC 447. Mr Sanjanwala alternatively submitted that there is no acknowledgment of liability merely by giving a cheque which is dishonored and the cheque which is dishonored cannot be regarded as part payment within the meaning of section 18 of the Limitation Act.He has relied upon the decision of the Bamboo High Court in the case of Chintaman Dhundiraj Vs. Sadguru Narayan Maharaj Datta Sanstha, AIR 1956 Bamboo 553.

In view of the aforesaid rival contentions, the question to be decided is whether the appellant, has made necessary averment in the plaint and has lead necessary evidence for the same. Upon the appellant succeeding on this point, the necessity will arise to decide the second question, namely whether the issuance of cheques amounts to acknowledgment of liability and debt.

The Supreme Court in the case of Sant Lal vs. Kamla Prasad (supra), has ruled that to claim exemption under section 20 of the Limitation Act, 1908, the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that section. The ground of exemption is not complete without this second element and unless both these elements are proved to exist on the date of the plaint, the suit would be held to be time barred.In view of this judgment, it is to be seen whether the appellant-plaintiff has made necessary averments in that regard in the plaint and has proved the

same by leading evidence.

In para 5 of the plaint, the appellant has averred that "the defendants having stopped the payments from March 1974 are liable to pay interest @ 9% p.a. under the terms of sale and trade practice on due amount. The defendants were to pay the price of goods sold within 60 days but have failed to do so and inspite of repeated demands, they have not paid the same till today. Further, the two cheques sent by the defendant dated 15.4.74 and 27.3.74 of Rs. 5000/ each were not honored in bank, hence this suit."

In para 9 of the plaint, it is stated that "the cause of action has arisen under the rule of appropriation from the date of last payment towards the due i.e. 4.3.74, hence suit is in time."

There is no dispute with regard to the fact that the last payment dated 4.3.1974 is by cash. However, the appellant claims the benefit of sections 18 and 19 for extension of period of limitation in view of the issuance of two subsequent cheques by the respondent without mentioning the provisions of sections 18 and 19 of the Act. Thus, there is a specific averment by the appellant in the plaint. The respondent,except denial, has not stated anything in this regard. On behalf of the appellant,Amrutlal Punamchand Parikh, an Accountant has been examined at Ex. 40.In para 5 of his deposition, he has stated that the two cheques given by the respondent were presented in the bank which are dishonored. He has produced the cheques alongwith the memo of the bank.He has specifically stated that the last payment was received by cheque on 3.2.1973 and the said cheque was also accepted by the bank. Surprisingly, there is no cross examination of this witness by the respondent. In other words, the evidence of the witness of the appellant has gone unchallenged. The respondent has in the instant case not led any evidence. In this view of the matter, I am clearly of the opinion that the appellant who is basing his case on the basis of the cheques issued has not only made averments in the plaint, but has also proved the same by leading evidence. Merely because sections 18 and 19 have not been referred to in the plaint, that

fact by itself will not make the appellant disentitled from claiming the benefits arising out of the said provisions of sections 18 and 19 of the Limitation Act.In my opinion, the appellant has clearly established the requirements of Order 7 R. 6 of the Civil Procedure Code which deal with the grounds for exemption of limitation law by making averments regarding the issuance of two cheques by the respondent. Even otherwise also, the appellant is entitled to claim the benefit arising out of sections 18 and 19 of the Limitation Act in view of the fact that the two cheques are given by the respondent in part payment of their dues, acknowledging their liability."

Apart from the aforesaid observations appearing in the referring judgment, it is settled law that pleadings are to be construed liberally. There is clearly an averment with regard to the two dishonored cheques in the plaint itself. The plaintiff is not legally obliged to set out the law in the pleadings by showing that the cheques would save limitation under sec.18 of the Limitation Act. In that view of the matter also, the first submission of Mr. Sanjanwala will not stand.

In so far as the second submission is concerned, it has never been the case of the defendant that the cheques were sent either by way of full and final settlement of the plaintiff's claim or only with regard to the outstanding amount covering the amount of cheques. In fact, the cheques were sent after the receipt of the suit notice issued by or on behalf of the plaintiff. These facts are not in dispute. The notice clearly indicates demand of suit claim from the defendant. In that view of the matter, the second submission also will not have any merits in it. The same deserves to be rejected.

Mr Kapadia learned advocate for the plaintiff canvassed non-awarding of interest at the rate of 9% by the trial court. This is what the trial court has observed in its finding regarding issue no. 6.

"The plaintiff has claimed Rs.11124/- by way of interest at 9%. The defendant has denied in his written statement about the existence of an agreement between the parties regarding interest. There is no evidence also on the record of the case to show any such agreement regarding

interest between the parties. There is a printed condition in bill that 9% interest would be charged in case of late payment for more than 15 days. But none of these bills bear the buyer's signature. Therefore, it cannot be said that there is an agreement between the parties regarding interest. A unilateral condition regarding interest cannot be said to be an agreement between the parties.

I, therefore, hold that the plaintiff is not entitled to any amount by way of interest. This issue is therefore, answered accordingly."

The aforesaid observations of the trial court are clearly contrary to the legal position. When a bill containing condition of interest is issued and the other party to whom the bill is issued does not dispute any of the conditions while receiving the bill acceptance is apparent on the face of such conduct. Thus, the condition with regard to the interest at the rate of 9% contained in bill when not opposed or refused or counter proposed, that condition becomes part of the contract between the parties as contemplated by the bill itself. It cannot be said to be unilateral condition as observed by the trial court. In that view of the matter, finding of the trial court on issue no. 6 shall have to be reversed.

In the result, this appeal is allowed. Cross-objections of the defendant are dismissed. The defendant is directed to pay Rs. 61,886/- plus Rs. 11,124/- by way of interest and costs of the suit with running interest at the rate of 6% p.a. from the date of the suit till realisation. Decree passed by the trial court shall stand modified in these terms. In so far as this Appeal as well as Cross - objections are concerned,there shall be no order as to costs.

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